

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE

GABRIEL G. ATAMIAN, M.D.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 01-663-SLR
	)	
JO ANNE B. BARNHART,	)	
Commissioner of	)	
Social Security,	)	
	)	
Defendant.	)	

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Gabriel G. Atamian, M.D., Dover, DE. Plaintiff, pro se.

Colm F. Connolly, United States Attorney and Judith M. Kinney,  
Assistant United States Attorney, United States Attorney's  
Office, Wilmington, Delaware. Counsel for Defendant.

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**MEMORANDUM OPINION**

Dated: May 6, 2002  
Wilmington, Delaware

**ROBINSON, Chief Judge**

**I. INTRODUCTION**

Plaintiff Gabriel G. Atamian, M.D. filed this action against defendant Jo Anne B. Barnhart, the Commissioner of Social Security ("Commissioner"), on October 1, 2001. (D.I. 1) Plaintiff seeks judicial review, pursuant to 42 U.S.C. § 405(g), of a decision by the Commissioner denying his claim for monthly retirement benefits under Title II of the Social Security Act, 42 U.S.C. §§ 401-433. Currently before the court is defendant's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) or, in the alternative, for summary judgment. (D.I. 9) For the reasons that follow, the court shall grant defendant's motion.

**II. BACKGROUND**

On August 23, 1997, responding to plaintiff's application for retirement benefits, the Commissioner notified plaintiff that he would be eligible to receive monthly retirement benefits of \$498.00 beginning in September 1997. (D.I. 10, Ex. A(1)) On September 29, 1997, plaintiff requested reconsideration of the computation methods used to determine his monthly retirement benefits. (Id., Ex. A(2)) The Commissioner denied plaintiff's request on May 4, 1999. (Id., Ex. A(3))

Plaintiff again requested reconsideration on May 10, 1999, arguing that his "retirement benefits should have been determined pursuant to[] 42 U.S.C.A. § 415(b)(2)(A) rather than the usual way." (Id., Ex. A(4)) On June 15, 1999, the Commissioner denied

the request as untimely, and informed plaintiff that the May 4, 1999 letter was not an initial determination and did not offer appeal rights. (Id., Ex. A(5))

On June 28, 1999, plaintiff submitted a Request For Hearing By Administrative Law Judge ("ALJ"), again claiming that his monthly retirement benefits should have been determined pursuant to 42 U.S.C. § 415(b)(2)(A) "rather than the usual way." (Id., Ex. A(6)) By letter dated April 24, 2000, the Commissioner notified plaintiff of a hearing scheduled for May 26, 2000 at 2:30 PM, with ALJ James L. Feight. (Id., Ex. A(7)) The Notice of Hearing stated:

I have set aside this time to hear your case.  
If you do not appear at the hearing and I do  
not find that you have good cause for failing  
to appeal, I may dismiss your request for  
hearing. I may do so without giving you  
further notice.

(Id.)

On April 25, 2000, in accordance with instructions in the Notice of Hearing, plaintiff requested the issuance of a subpoena for his medical records from the Commonwealth of Virginia Board of Medicine, who previously refused to send plaintiff his records. (Id., Ex. A(8)) On May 8, 2000, plaintiff sent another letter requesting and explaining the need for the subpoena. (D.I. 11) Plaintiff argued that the "subpoena would have revealed why plaintiff's license to practice medicine was revoked

thus rendering plaintiff unable to earn a living."<sup>1</sup> (Id.) Plaintiff also claimed that the subpoena "was essentially and comparatively the same as a vocational consultant's report." (Id.) The ALJ denied plaintiff's request for a subpoena. (Id., Ex. A(11)) Plaintiff alleges that he learned about the denial of the subpoena orally from the clerk on May 25, 2000. (D.I. 11) In a letter dated the same day, plaintiff explained that he would not attend the hearing because the ALJ did not issue the subpoena that he requested and, consequently, his record was incomplete. (D.I. 10, Ex. A(10)) Plaintiff also demanded that the ALJ disclose his religion and stated that "if [you] are a jewish judge you should recuse yourself." (Id.) Plaintiff did not appear at the hearing.

On July 11, 2000, the ALJ issued a Notice of Dismissal dismissing plaintiff's case because he failed to show good cause for not appearing at the scheduled hearing. (Id., Ex. A(11)) The ALJ stated that plaintiff was notified before the hearing that the requested subpoena did not relate to the subject matter of the hearing and that he had no obligation to disclose his

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<sup>1</sup>Plaintiff is an Arab-Christian and held a Syrian Passport when he first entered the United States. (D.I. 11) Plaintiff claims that because a "Jewish Conspiracy," allegedly beginning in 1982, led to his inability to practice medicine and labeled him a schizophrenic, he is disabled pursuant to 42 U.S.C. § 415 (b)(2)(B)(iii). Thus, the calculation of his monthly retirement benefits should have included the years 1982 through 1997. (D.I. 11)

religion. (Id.) Further, the ALJ noted that plaintiff's reasons for failing to appear at the hearing did not constitute good cause and that this had been communicated to plaintiff before the hearing. (Id.)

Plaintiff's subsequent request for review of the ALJ's decision was denied on August 23, 2001. (Id., Ex. A(14)) Plaintiff filed the instant appeal on October 1, 2001. (D.I. 1) On October 3, 2001, the Appeals Council vacated its August 23, 2001 decision and issued a new, expanded decision that found no evidence of alleged ALJ misconduct<sup>2</sup> and upheld the ALJ's decision. (D.I. 10, Ex. A(15))

### **III. STANDARD OF REVIEW**

Not only may the lack of subject matter jurisdiction be raised at any time, it cannot be waived and the court is obliged to address the issue on its own motion. See Moodie v. Fed. Reserve Bank of NY, 58 F.3d 879, 882 (2d Cir. 1995). Once jurisdiction is challenged, the party asserting subject matter jurisdiction has the burden of proving its existence. See Carpet Group Int'l v. Oriental Rug Importers Ass'n, Inc., 227 F.3d 62, 69 (3d Cir. 2000).

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<sup>2</sup>Plaintiff claimed the ALJ committed misconduct prior to the hearing because he included "three unusual illustrations" in a May 23, 2000 letter rescheduling the ALJ hearing to an earlier time in the day. (D.I. 10, Ex. A(12)) The "illustrations" included a ": P" after the salutation in the letter, "10:00 AM" underlined twice by hand, and the words "Administrative Law Judge" hand-written under the ALJ's name. (Id.)

Under Rule 12(b)(1), the court's jurisdiction may be challenged either facially (based on the legal sufficiency of the claim) or factually (based on the sufficiency of jurisdictional fact). See 2 James W. Moore, Moore's Federal Practice § 12.30[4] (3d ed. 1997). Under a facial challenge to jurisdiction, the court must accept as true the allegations contained in the complaint. See id. Dismissal for a facial challenge to jurisdiction is "proper only when the claim 'clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or . . . is wholly insubstantial and frivolous.'" Kehr Packages, Inc. v. Fidelcor, Inc., 926 F.2d 1406, 1408-1409 (3d Cir. 1991) (quoting Bell v. Hood, 327 U.S. 678, 682 (1946)).

Under a factual attack, however, the court is not "confine[d] to allegations in the . . . complaint, but [can] consider affidavits, depositions, and testimony to resolve factual issues bearing on jurisdiction." Gotha v. United States, 115 F.3d 176, 179 (3d Cir. 1997). See also Mortensen v. First Fed. Sav. & Loan Ass'n, 549 F.2d 884, 891-892 (3d Cir. 1977). In such a situation, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." Carpet Group, 227 F.3d at 69 (quoting Mortensen, 549 F.2d at 891). Although the court should determine subject matter jurisdiction at the outset

of a case, "the truth of jurisdictional allegations need not always be determined with finality at the threshold of litigation." Moore at § 12.30[1]. Rather, a party may first establish jurisdiction "by means of a nonfrivolous assertion of jurisdictional elements and any litigation of a contested subject-matter jurisdictional fact issue occurs in comparatively summary procedure before a judge alone (as distinct from litigation of the same fact issue as an element of the cause of action, if the claim survives the jurisdictional objection)." Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 537-38 (1995) (citations omitted).

#### **IV. DISCUSSION**

Defendant argues that because plaintiff did not appear for an administrative hearing, he never received a final decision from the Commissioner and, consequently, the court does not have jurisdiction over the matter.

The Social Security Act authorizes judicial review of a claimant's request for benefits only when the Commissioner renders a "final decision" after an administrative hearing before an ALJ.<sup>3</sup>

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<sup>3</sup>Under the regulations, a claimant must complete a four step process in order to obtain a final decision and qualify for judicial review. The steps are:

(1) Initial determination. This is a determination we make about your entitlement or your continuing entitlement to benefits or about any other matter, as discussed in Sec.

Any individual, **after any final decision of the Commissioner of Social Security made after a hearing to which he was a party**, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within 60 days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow.

42 U.S.C. § 405(g) (emphasis added). Section 405(g) is the exclusive jurisdictional basis for judicial review of cases arising under Title II of the Social Security Act. See 42 U.S.C. § 405(h). An exception to the "final decision" rule applies when a claimant is presenting a constitutional claim or a claim that

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404.902, that gives you a right to further review.

(2) Reconsideration. If you are dissatisfied with an initial determination, you may ask us to reconsider it.

(3) Hearing before an administrative law judge. If you are dissatisfied with the reconsideration determination, you may request a hearing before an administrative law judge.

(4) Appeals Council review. If you are dissatisfied with the decision of the administrative law judge, you may request that the Appeals Council review the decision.

(5) Federal Court Review. **When you have completed the steps of the administrative review process listed in paragraphs (a)(1) through (a)(4) of this section, we will have made our final decision.** If you are dissatisfied with our final decision, you may request judicial review by filing an action in Federal district court.

20 C.F.R. § 404.900(a) (emphasis added).



is wholly collateral to the claim for benefits. See Califano v. Sanders, 430 U.S. 99, 108-09 (1977).

An ALJ may dismiss a claimant's request for a hearing (thereby preventing the claimant from obtaining a "final decision") when the claimant fails to appear at the scheduled hearing, the claimant was informed that failure to appear would result in dismissal without further notice, and the ALJ finds that the claimant has not shown good cause for failing to appear. See 20 C.F.R. § 404.957(b)(1)(i). The claimant may appeal this decision to the Appeals Council, whose determination is binding. See 20 C.F.R. §§ 404.958, 404.959.

In the instant case, plaintiff is requesting that the court review a claim for benefits that was not the subject of an administrative hearing before an ALJ. Thus, plaintiff has failed to obtain a "final decision" that permits judicial review of the merits of his claim. Furthermore, plaintiff has failed to raise a constitutional or collateral claim that would constitute an exception to the "final decision" rule. The court also finds that the ALJ did not abuse his discretion in dismissing plaintiff's request for a hearing. Plaintiff was notified that his request may be dismissed if he failed to appear, and the denial of a subpoena to expose the alleged "Jewish conspiracy" against plaintiff and the ALJ's refusal to disclose his religion

do not constitute good cause. Thus, the court lacks jurisdiction over the merits of plaintiff's claim for retirement benefits.

**V. CONCLUSION**

For the reasons stated, defendant's motion to dismiss for lack of subject matter jurisdiction is granted. An appropriate order shall issue.

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JO ANNE B. BARNHART,	)	
Commissioner of	)	
Social Security,	)	
	)	
Defendant.	)	

O R D E R

At Wilmington this 6th day of May, 2002, consistent with the memorandum opinion issued this same day;

IT IS ORDERED that defendant's motion to dismiss the complaint (D.I. 9) is granted.

Sue L. Robinson  
United States District Judge